

After reviewing the entire record, for purposes of preliminary hearing the Appeals Board finds as follows:

The preliminary hearing Order entered by the Administrative Law Judge should be affirmed.

(1) The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant was an employee of the respondent on the date of accident, March 22, 1995.

The primary test used to determine whether the employer-employee relationship exists is whether the employer has the right to control and supervise the worker and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. Falls v. Scott, 249 Kan. 54, 64, 815 P.2d 1104 (1991). Other factors that are significant are the right to discharge the worker, payment by time rather than completed project, and the furnishing of tools or equipment. McCarty v. Great Bend Board of Education, 195 Kan. 310, 403 P.2d 956 (1965).

Based upon the record compiled to date, the Appeals Board finds that respondent retained the right to discharge and exercised such control over claimant's work that the relationship of employer-employee was created. Respondent controlled what claimant did and when he would do it. The Appeals Board likewise agrees with the Administrative Law Judge that the alleged partnership arrangement was a sham.

(2) The record is devoid of evidence linking alcohol or drugs to the March 22, 1995, accident. Therefore, the Appeals Board agrees with the Administrative Law Judge's conclusion that respondent has not shown that claimant's injuries were contributed to by their consumption.

(3) In the application for review, the respondent and its insurance carrier asked the Appeals Board to review the issue of whether the parties are covered by the Workers Compensation Act. Because neither the preliminary hearing transcript nor respondent's brief discloses the basis of contention surrounding that issue, the Appeals Board is unable to review it.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated September 20, 1996, entered by Administrative Law Judge Bryce D. Benedict should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Gregory D. Worth, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director